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No.

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IN THE

Supreme Court of the United States

October Term 1992

ESSEX ELECTRO ENGINEERS, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether legislative authority has been delegated to the executive agencies to impose a restrictive definition of the specific statutory term that provides private parties with access to the procedures and rights granted by Congress for resolving claims against those agencies.

2. Whether a restrictive definition in an agency regulation that generates litigation over the meaning of "claim" while frustrating the resolution of the claim itself is reasonable and consistent with the federal purpose and intent mandated by Congress to require the early submission and prompt resolution of the claim.

3. Whether a restrictive "claim" definition in an agency regulation that interferes with a private party's access to the procedures and rights afforded by statute violates fundamental concepts of due process when the regulation is adopted without notice nor any meaningful opportunity to be heard.

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OPINIONS BELOW[1]

The Opinion of the Court of Appeals for the Federal Circuit, Essex Electro Engineers, Inc. v. United States, 960 F.2d 1576 (Fed.Cir. 1992), and its unreported orders, appear in the Appendix hereto. The Claims Court Opinion, Essex Electro Engineers, Inc. v. United States, 22 Cl.Ct. 757 (1991), and its Opinion on reconsideration, not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1992. A timely petition for rehearing with a suggestion for rehearing in banc was denied May 12, 1992, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1] Pursuant to Rule 14.1(b), all parties to this proceeding appear in the caption of the case. As required by Rule 29.1, Essex Electro Engineers, Inc., is a small business with no parent company nor any subsidiaries.

STATUTES AND REGULATIONS[2]

United States Code, Title 41:

§ 605. Decision by the contracting officer

(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, but, if made, shall not be binding in any subsequent proceeding....

(b) The contracting officer's decision on the claim shall be final and conclusive

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[2] In accordance with Rule 33.3, page numbers are excluded from this Section.

and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * *

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) [41 U.S.C. §605(a)] from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary

of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

United States Code, Title 31:

§3729. False claims

(c) Claim defined. For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Regulations, CFR Title 48:

§52-233-1 Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a

written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.[3]

* * *

(g) The Government shall pay interest on the amount found due and unpaid from the date the Contracting Officer receives the claim (properly certified if required), or

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[3] The Court of Appeals referred to the same "claim" definition found in the regulations at 48 CFR §33.201.

(2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

STATEMENT OF THE CASE[4]

Claims arose during a contract under which Petitioner, Essex Electro Engineers, Inc. ["Essex"], a small business located in Illinois, was to overhaul and reconfigure 122 mobile electric power plants for the Navy. The basic Contract price with options totaled $4,036,540. [Appendix, below, pp. 21-26]. During performance, three change orders were issued by the contracting officer under the Changes Clause, which specifies that "nothing...shall excuse the Contractor from proceeding with the contract as changed."[5] The claims each related to the additional work required by the change orders on which Essex was forced to proceed and incur costs for many months and even years before a

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[4] There is no issue of fact because the Opinions below were entered on defendant's motion to dismiss for lack of subject matter jurisdiction which was treated as a motion for summary judgment.

[5] Federal Acquisition Regulations ["FAR"], CFR Title 48, §52.243-1 "Changes--Fixed Price."

total amount of more than $2,000,000 was eventually found due and paid on the claims. All three share a common assertion that each submission to the Contracting Officer was a claim under the Contract Disputes Act ["CDA"], and thus began to accrue interest until the amount due was ultimately paid. [Appendix, hereto, pp. 38-39].

1. The Change Orders and Claims

On October 7, 1986, the Contracting Officer issued Change Order A00004 requiring additional work to incorporate listed replacement parts in the contract items. Change Order P00002 had been issued on April 23, 1986, requiring the addition of winterization support equipment. On September 24, 1986, the Contracting Officer also issued Change Order P00004 directing the addition of work on each power plant "over and above" the basic work. The only difference in the "over and above" change order was that Essex

was first required to submit an inspection report with individual increased costs for the work on each unit. [Appendix, hereto, pp. 40, 44-45, 48-49].

On April 13, 1987, Essex submitted a letter to the Contracting Officer which demanded the sum of $448,746.50 for the replacement parts change order, with a certification of the "claim" plainly drafted to conform to the CDA and signed by Essex's president. On April 15, 1987, Essex submitted a letter which was identical to the form of the letter submitted on April 13, 1987, and demanded the sum of $720,546.91 for the winterization equipment change order, with the same CDA certification signed by Essex's president. Enclosed with each letter was a breakdown of the increased costs for each change order. [Appendix, hereto, pp. 41, 46, & below, pp. 94-114].

With respect to the "over and above" change order, after Essex had submitted the reports of the specific change costs for 56 units without action by the Contracting Officer other than to direct that the additional work proceed, on January 26, 1987, Essex specifically identified each of the inspection reports as a "claim." [Appendix, below, p. 90]. None of the individual claims exceeded $50,000.00 and, therefore, none were certified under the CDA. [Appendix, hereto, p. 50 & below, pp. 27-77].

After Essex had been performing the additional replacement parts work for sixteen months and the Contracting Officer had "reviewed" the claim, the parties executed a contract amendment in February 1988, which "definitized" $339,429 as the amount due for Change Order A00004 subject to a reservation of Essex's rights. The amount due was paid in March 1988, after Essex had incurred increased costs and substantially

completed the changed work. [Appendix, hereto, pp. 41-42, & below, pp. 196-198].

After Essex had been performing the support equipment work required by Change Order P00002 for almost three years, in March 1989, the parties executed a contract amendment, which defined $629,657.48 as the amount due and explicitly reserved Essex's right to CDA interest and to claim for delay. [Appendix, hereto, p. 47, & below, pp. 127-128 & 146-148]. In March, 1989, $603,851.04 of the amount due was paid after Essex had incurred the increased costs and completed the changed work, as well as virtually all other work on the entire Contract. [Appendix, hereto, p. 47, & below, pp. 187 & 196-198]. The balance of the amount due on Essex's certified claim was partially paid in April, 1989, with the remainder not paid until July, 1990. [Appendix, below, pp. 102-114 & 204-205].

Beginning with the "over and above" change cost report submitted on March 27, 1987, and continuing for the remaining units, Essex specifically stated that each report was a "claim for an equitable adjustment pursuant to the Contract Disputes Act." [Appendix, hereto, p. 50]. Also, on April 23, 1987, by another notice to the Contracting Officer, Essex confirmed that each submission was a claim under the CDA on which "interest accrues" and Essex's president provided an overall CDA certification and requested a final decision. [Appendix, below, pp. 115-116]. Thereafter, during the next two years, 14 bilateral amendments were sporadically executed by the Contracting Officer during and after Contract performance reflecting the settled amounts due for the "over and above" changed work on each of the units. [Appendix, hereto, p. 51 & below, p. 117]. An average of one year elapsed on each of the 119 claims

resulting from Change Order P00004 before payments were made after the increased costs had been incurred and the completed unit had been shipped to the Government.[6] The total of the amounts that were eventually paid to Essex was $1,118,878.13. [Appendix, below, pp. 158-161].

None of the payments of amounts due on the change order claims included an amount for the accrued CDA interest to the date of payment.

2. Interest on the Amounts Found Due

In May, 1989, Essex submitted three written claims to the contracting officer for the unpaid interest under the CDA on the amounts found due and paid on the claims for Change Order A00004, P00002 and P00004, commencing on the respective claim dates and running until the payment dates. [Appendix, hereto, pp. 42, 47, 51-52]. On October 20, 1989, the Contracting Officer issued

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[6] Three of the original 122 units were eventually terminated for the Government's convenience.

a final decision on the unpaid interest pertaining to the claim for Change Order A00004, which was modified by a second final decision on February 20, 1990. On February 20, 1990, the Contracting Officer also issued a final decision on the unpaid interest on the claim for Change Order P00002. The final decisions were based on calculations reducing the accrued interest from the full interest accrued on the amount found due from the claim date until paid. [Appendix, hereto, pp. 43-44, 47-48]. On two occasions, the Contracting Officer indicated that a final decision would be forthcoming on the unpaid interest on the claims for Change Order P00004, but the Contracting Officer was replaced and no decision had been issued as of the file date of the action below. [Appendix, hereto, p. 52].

The Claims Court found that the "plain import" of the Contracting Officer's final decisions with respect to the unpaid interest is

that she treated the April 13 and April 15, 1987, submissions as claims under the CDA. [Appendix, hereto, p. 52]. However, even the reduced amount of interest in the Contracting Officer's final decisions has never been paid.

3. The Opinions Below

Pursuant to the CDA, 41 U.S.C. §607, Essex initiated the action in the Claims Court for the unpaid interest. On the basis of being bound by Dawco Construction Co., Inc. v. United States, 930 F.2d 872 (Fed.Cir. 1991), the Claims Court denied interest on the more than $2,000,000 in additional work that Essex had been forced to perform and dismissed Essex's complaint. With respect to Essex's certified submissions of April 13 and April 15, 1987, arising from Change Orders A00004 and P00002, the Claims Court held that, "although there was nothing tentative about the assertion of rights, although the CDA was invoked, and although there was no question

that a change order had taken place," the submissions "were not claims" because "negotiations had not clearly been abandoned" and the "amount claimed was not definitely in dispute." The Claims Court viewed Dawco as requiring that the parties "must have reached something approaching impasse... before a claim can arise" thus barring interest under the CDA. [Appendix, hereto, pp. 63-66].

The Federal Circuit affirmed on grounds that had not been briefed or argued in the lower Court or in the appellate proceeding. The Federal Circuit held that Essex's submissions, certified as claims under the CDA and which were ultimately evaluated and resolved by the contracting officer, were not "claims" by an application of other portions of the agency's "claim" definition that a "claim" be (1) a "demand or assertion...in writing, (2) the money must be sought as a matter of right, and (3) the

writing must set forth a sum certain." [Appendix, hereto, pp. 16, 22].

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with Principles Established by this Court for Applying Separation of Powers to Properly Define a Grant of Legislative Authority by Congress.

Neither Court below addressed the intent and purpose of Congress in the CDA and its legislative history. In each instance, the Court simply imposed the executive's definition of "claim" in its "Disputes" regulation.

In order for a private party to invoke the claim resolution procedures and rights afforded by the CDA, Congress only required that a written claim be submitted to the contracting officer with a certification if more than $50,000 was being sought. [Title 41 U.S.C. §§605 & 611]. Nevertheless, the Opinions below uphold an interpretation of the agency's "Disputes" regulation that imposes substantial restrictions

on access to the CDA. Not only must a written claim be submitted to the contracting officer as specified in the CDA, but the Opinions hold that the "claim" cannot exist unless (1) the subject of the claim is somehow already disputed before the claim is submitted, (2) negotiations are at an impasse and have been abandoned, (3) the claim recites a written demand or assertion, (4) the claim seeks money as a matter of right, and (5) the claim sets forth a sum certain. Neither Opinion considers the conflict with Congress in accepting the agency's self-serving regulation that severely restricts the contractor's right to invoke the CDA and forces a choice of either refusing to negotiate or extending unreimbursed credit to the Government for the cost of additional work ordered by the agency and on which the contractor is obligated to immediately proceed.

Twenty years ago this Court last provided guidance regarding a private party's claim rights on a government contract in S&E Contractors, Inc. v. United States, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972). The Court had no difficulty in recognizing that submissions in response to various change orders were "a series of claims to the contracting officer for resolution under the standard disputes clause contained in the contract, asking for equitable modifications of the contract and additional compensation." Id., 406 U.S. at 5, 92 S.Ct. at 1414 (Emphasis added). The Court observed that the "Disputes" clause then included in Government contracts was intended "to provide a quick and efficient administrative remedy and to avoid 'vexatious and expensive and, to the contractor oftentimes, ruinous litigation.' Kihlberg v. United States, 97 U.S. 398, 401 (1878). The contractor has ceded his

right to seek immediate judicial redress for his grievances and has contractually bound himself to 'proceed diligently with the performance of the contract' during the dispute process." The Court further noted that to postpone payment on claims for changes "is to sanction precisely the sort of 'vexatious litigation' which the disputes process was designed to avoid." S&E., 406 U.S. at 8, 92 S.Ct. at 1416.

The "Disputes" regulation that was the subject of S&E was fully consistent with the Wunderlich Act, 41 U.S.C. §321-322, in providing for the finality of a final decision if an appeal was not filed and requiring the performance of work in accordance with the contracting officer's decision pending a resolution of the appeal. S&E, 406 U.S. at 3 nts. 1 & 2, 92 S.Ct. at 1413 nts. 1 & 2. The agency's current definition of "claim", restricting access to the disputes process, did not come until Congress

enacted the CDA with its explicit provisions regarding the timing for processing claims and the private party's right to interest while a claim is pending.

The CDA bill that had been reported out of committees of the Senate (S 3178) stated in Section 12 that "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the claim...accrues until payment..." The Senate Joint Committee Report noted that the contractor's cost of financing ordered additional or changed work was a legitimate business expense and stated that the interest section of the bill:

> ...provides interest to the contractor upon a favorable decision on his claim from the point in time the cause of action raises (arises) or the additional costs are incurred whichever is later, to the date of payment following either a final decision of the agency board or a court of competent jurisdiction, or a settlement between the contractor and the Government prior to a decision by the agency boards or the courts. [S.Rep.No. 1118, 95th

Cong., 2d Sess. 32 (1978); Emphasis supplied].

The bill was then specifically amended to provide for interest to begin on the date when a claim was submitted to the contracting officer and to delete the "whichever is later" language. Sen. Robert Byrd explained that the change was deemed necessary to fix the actual starting date of interest in order to "serve as an incentive for contractors to submit claims as soon as they are identified." [124 Cong. Rec. 36267 (1978)].

This history is counter to any conclusion that Congress intended to equate a claim with a dispute or to impose technicalities on the content of a claim. The evolution of the actual language of the Interest provision demonstrates a contrary intent. A claim could "accrue", i.e., the cause of action could arise with the contractor bearing the cost of financing the additional work, well before a disagreement ever actually existed. The Senate Report establishes

that Congress intended to compensate contractors for such financing costs.

Furthermore, the Act (Pub. L. No. 95-563) does not suggest that "claim" and "dispute" are synonymous terms. The preamble refers to "the resolution of claims and disputes relating to Government contracts." In two paragraphs, §605(a) and Pub. L. No. 95-563, §14, the Act uses the words "claim" and "dispute" separated by the disjunctive "or."

In its seminal decision, Brookfield Construction Company, Inc. v. United States, 661 F.2d 159 (Ct.Cl. 1981), the United States Court of Claims addressed the "important legislative purpose of allowing interest" in the Act. "Congress definitely thought it fair and proper to grant interest to contractors as a 'legitimate cost' of performance." [Footnote omitted].

> "[A]nother essential policy for the allowance of interest was its 'beneficial effect in providing additional inducement for the settlement of claims short of

> litigation...[Citations omitted]. 'The contracting officer should know of the claim in a reasonable amount of time... to give the contracting officer...the opportunity to act so as to limit the dollar exposure in interest.' [Citations omitted]" Brookfield Construction Company, Inc., supra., at 164; Emphasis in original in part.

The Federal Circuit did not even discuss Brookfield in the decision below.

Thus, Congress expressly provided for the private party's access to the claims resolution process and right to interest by the submission of a written claim with a certification if required. The explicit purpose and intent of these provisions was the early submission of claims and to induce a prompt negotiated resolution without resort to litigation. When Congress chose the term "claim" as the threshhold for access to the procedures and rights afforded by the CDA, Congress had knowledge of the meaning of the term it selected.

The word "claim" has a plain meaning that has been defined as "a demand for something rightfully or allegedly due; assertion of one's right to something" Webster's New World Dictionary (1968 ed.); also, an "assertion open to challenge...possible contradiction." Webster's New Collegiate Dictionary, G. & C. Merriam Company, 1981. "Claim" is considered to be a "broad, comprehensive word"; among many accepted meanings are a "legal capability to require a positive or negative act of another person," and a "notice that claimant is claiming compensation and benefits." Black's Law Dictionary (1968), rev. 4th ed., pp. 313-14.

Congress also adopted a very broad definition of "claim" in related legislation. The False Claims Act, Title 31 U.S.C. §3729(c), defines claim as any "request or demand...under a contract" if the Government will reimburse "any portion of the money or property which is

requested..." This Court has explicitly held that "claim" should not be given a narrow reading and should apply to all "attempts to cause the Government to pay out sums of money." United States v. Neifert-White Company, 390 U.S. 228, 233, 88 S.Ct. 959, 962, 19 L.Ed.2d 1061 (1968). In considering the breadth of the provision "any claim against the United States" in the Federal Tort Claims Act, this Court held that such terms involve "broad words in common usage...[t]hey are not terms of art." United States v. Yellow Cab Co., 340 U.S. 543, 548, 71 S.Ct. 399, 403, 95 L.Ed. 523 (1951).

Furthermore, in decisions other than the one below, the Federal Circuit had itself thoroughly reviewed the CDA and its legislative intent with results that conflict with the present Opinions. In Contract Cleaning Maintenance, Inc., 811 F.2d 586, 592 (Fed.Cir. 1987)

[a precedent which was not addressed by the Opinions below], the Court held--

> "We know of no requirement in the Disputes Act that a 'claim' must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. See e.g. Tecom [v. United States, 732 F.2d 935, 936-7 (Fed. Cir. 1984)]; Metric Constr. Co. v. United States, 1 Cl.Ct. 383, 392 (1983). The fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute 'claims.'" (Emphasis supplied).

In Servidone Const. Corp. v. United States, 931 F.2d 860, 862 (Fed.Cir. 1991), which also reviewed the intent and purpose of Congress in the CDA but was again ignored by the Court's Opinion below, the Federal Circuit specifically held that the claim receipt date "sets a single, red-letter date for interest on all amounts found due...without regard to when the contractor incurred the costs."

If statutory language is clear, it is ordinarily conclusive. Consumer Project Safety Comm. v. GTE Sylvania, Inc. 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). There is no known recognized authority that incorporates a prerequisite for an existing dispute in the normal and customary meaning of the word "claim." The only source for attaching a special meaning to the word "claim" would be the statute itself or its legislative history. The parameters of the agency's authority are found in the statute. [See, T.V.A. v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); Consumer Prod. Safety Comm'n, supra.] In relying on the agency's interpretive regulation, the Court below contradicted the fundamental principles of statutory construction established by this Court and reiterated in decisions of the Federal Circuit itself.

In the only precedent cited by the Federal Circuit, other than Dawco, this Court had found that in appropriate circumstances a court may accord weight to an interpretation by an agency with expertise when a statute is ambiguous. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). On the other hand, courts should refuse to enforce agency interpretations when the statute is not ambiguous and does not demand expertise of an agency or when the interpretation does not accord with the thrust of the statute. Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986). As was said in Office of Communication of the United Church of Christ v. Federal Communications Comm'n., 707 F.2d 1413, 1422-23 (D.C. Cir. 1983), "[t]o do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that adminis-

trative agencies remain within the bounds of their delegated authority. Indeed, it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority."

The Court must examine carefully allegations that an agency transgressed its statutory jurisdiction. Pender Peanut Corp. V. United States, 20 Cl.Ct. 447, 452 (1990). [FDA attempted enforcement of a regulation imposing a penalty for a failure to dispose of excess peanuts--"This regulation 'must therefore be regarded as no more than an attempted addition to the statute of something which is not there.' [Commissioner v.] Acker, 361 U.S. [87,] at 94, 80 S.Ct. [144,] at 148, [4 L.Ed.2d 127 (1959)]." Pender Peanut Corp, 20 Cl.Ct. at 455.

In not hesitating to strike down restrictive regulations, the Court in Planned Parent-

hood Federation of America, Inc. v. Heckler, 712 F2d 650 (D.C. Cir. 1983), stated--

> "We will declare regulations in excess of statutory authority if they 'bear no relationship to any recognized concept of" the particular statutory terms at issue. Batterton v. Francis, 432 U.S. 416, 428, 97 S.Ct. 2399, 2407, 53 L.Ed.2d 448 (1977). Agency action must be found to be consistent with the congressional purposes underlying the authorizing statute. See id.; Morton v. Ruiz, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1966)." See, also, NLRB v. Brown, 380 U.S. 278, 291-92, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968).

The term "claim" in the CDA is not ambiguous. The framers of the Act clearly believed that anyone could determine the plain meaning of such a common term by consulting a dictionary, the False Claims Act, or decisions of this Court. If the agency had any valid doubt regarding a party's intent to submit a claim, that doubt could be readily resolved by simply asking if a "claim" was intended. Here, Essex

clearly, emphatically and repeatedly informed the agency that "claims" under the CDA were intended.

In Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), which was disregarded by the Court below, this Court provided a clear definition of the limits on the executive agencies' authority to adopt regulations as interpreting or implementing legislation enacted by Congress. The Court first distinguished between substantive rules, which affect "individual rights and obligations" and, if authorized, have the force of law, and those interpretive rules, which are "general statements of policy" and do not have the force and effect of law. [Id., U.S. at 301-2, S.Ct. at 1717-18]. In determining whether there has been a Congressional grant of "legislative authority" for substantive rules, the Court declared--

> "...in order for such regulations to have the 'force and effect of law,' it is nec-

> essary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress...The pertinent inquiry is whether under any of the arguable statutory grants of authority the...regulations relied on by the respondents are reasonably within the contemplation of that grant of authority." [Id., U.S. at 304-5, S.Ct. at 1718-19].

Finding no specific Congressional reference to the legislative authority claimed by the agency in Chrysler Corp. [Id., U.S. at 306, S.Ct. at 1720], the Court held--

> "...the thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separation of powers to denominate these particular regulations 'legislative' and credit them with the 'binding effect of law.'" [Id.].

Chrysler Corporation has been repeatedly cited as the standard against which the existence of legislative authority for a regulation will be determined. The Federal Circuit itself has not hesitated to limit or invalidate regulations in other contexts.

In Vivitar Corporation v. United States, 761 F.2d 1552 (Fed.Cir. 1985), involving trademark rights, the Court below held that a regulation lacked the force of law unless Congress specifically entrusted "an agency with the duty to exercise its judgment under guidelines set forth in a statute, and to fill in the extent of protection thereunder. Batterton v. Francis, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977)." The Federal Circuit held that "[w]ithout such authority,...regulations cannot affect the actual scope of... rights...under the statute." Citing Chrysler Corp., supra., the Court noted that legislative authority may sometimes be found without a specific grant "if it is clear from 'the language and logic of the [statute] and its legislative history' that such authority was contemplated." Vivitar Corp. v. United States, 761 F.2d at 1568-69.

In Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987), involving credit for service by a retiree, the Court below again applied Chrysler Corp., supra., to set aside an agency interpretation. Starting with the premise that the "task of rewriting a statute is and should remain a duty reserved for Congress," the Court held that "'deference ...should not be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' (quoting American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965))." [Horner, at 1527-28].

The Court then recited the "two requirements" set out in Chrysler Corp., 441 U.S. at 301-304--

> "...for any agency regulation to have the force and effect of law, it must first prescribe 'substantive' or 'legislative' rules rather than merely 'interpretive

> rules, general statements of policy, or rules of agency organization, procedure, or practice.'...Second, its promulgation must be pursuant to a specific statutory grant of authority and 'must conform with any procedural requirements imposed by Congress.'" Horner, at 1529.

In rejecting the agency's interpretation, the Federal Circuit held--

> "It is already established that an interpretive regulation which is contrary to the plain meaning of the statute that the regulation interprets, as well as to the statute's legislative history, cannot be sustained. General Electric Co. v. Gilbert, 429 U.S. 125, 145, 97 S.Ct. 401, 412-13, 50 L.Ed.2d 343 (1976)... A regulation which is issued without any legislative delegation of authority, which interprets a statute that needs no interpretation, and which also conflicts with another statute cannot be sustained." Horner, at 1530. See, also, T.V.A. v. Hill, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29, 57 L.Ed.2d 117 (1978); Dole v. United Steelworkers of America, 494 U.S. 26, 110 S.Ct. 929, 934 (1990).

Yet, here, in the context of the procedures and rights granted by the CDA, the Federal Circuit upheld the agency's restrictive "claim" definition only on the basis of an interpretation of authority in the Office of Federal

Procurement Policy Act [41 U.S.C. § 401 et seq. 24] ("OFPP Act"). [Appendix, hereto, pp. 13-14].

In the OFPP Act, Congress delegated only specific areas of limited authority to the executive subject to repeated directions to give "due regard to applicable laws." The OFPP Act explicitly mandates --

> "Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this Act, shall be assigned, delegated, or transferred to the Administrator." [Id., §405(g)].

There is not one single reference in the OFPP Act to the CDA nor to any assignment, delegation or transfer of any duties, functions, or responsibilities with respect to the CDA. The Court below even acknowledged that the "OFPP Act does not explicitly mention the CDA..." [Appendix, hereto, at p. 13]. Giving "due regard to applicable laws," a review of the CDA shows that Congress did not give any blanket

grant of authority to the OFPP. Congress permitted the executive agency to draft a clause limited to providing that the contractor must proceed with the work pending a resolution of his claim by a board or court or a "final settlement." [41 U.S.C. §605(b)]. Congress also permitted the agency to adopt a regulation to fix a "reasonable" time for decisions on claims [Id., §605(c)(3)]. Finally, Congress granted authority specifically to the OFPP only to the extent of permitting "guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards..." [Id. §607(h)]. Congress granted no authority in the CDA to impose a regulation setting forth a restrictive definition of a substantive term in the Act to frustrate access to the procedures and rights afforded in the Act.

Notwithstanding the foregoing explicit provisions, the Court below found that Congress

"does broadly authorize the executive to issue regulations, including regulations affecting the CDA [in] Subsection 405(a)" of the OFPP Act. Based on a partial quote from Subsection 405(a), the Federal Circuit concluded that there was authority to define the term "claim" in the CDA and that the executive was authorized to "elaborate" on the interest provision of the CDA by altering the date from which interest would accrue. [Addend. pp. 5, 13-14]. No authority was cited for the Court's conclusion.

A full quote of Section 405(a) from the OFPP Act actually reinforces the limitations on the executive rather than creating a blanket expansion of authority. That Section applies only to "carrying out the policies and functions set forth in this Act" subject to the repeated mandate to give "due regard for applicable laws" and provides merely that the "Administrator may prescribe Government-wide procurement policies"

to be "followed by executive agencies in the procurement of--(1) property...; (2) services...; and (3) construction..."

There is nothing in the "policies and functions set forth" in the OFPP Act nor in any "applicable law," including particularly the CDA, by which Congress delegated to the executive the power to define or "elaborate" on a statutory right of a private party for access to claims resolution procedures and rights under the guise of being a procurement "policy" to be followed by "executive agencies." Further, the term "policy" itself does not encompass defining or altering a private party's substantive statutory rights. Chrysler Corp. v. Brown, 441 U.S. at 301-2, 99 S.Ct. at 1717-18.

The conclusion that Congress did not delegate any power to the executive agencies to define or alter the statutory rights vested by Congress in the CDA is further reinforced by

recognizing that none of the specific delegations concerned the content of a "claim." Why would Congress make specific limited delegations in the CDA, if a blanket delegation may be found in a general policy provision of the OFPP Act?

The lack of a blanket delegation under the CDA is also confirmed by recognizing that, if it had intended to do so, Congress clearly knew how to make a blanket delegation of regulatory authority to the OFPP because it did so in the Prompt Payment Act [31 U.S.C. §3903]. Yet, Congress chose not to make a blanket delegation under the CDA and incorporated only the specific and limited grants of authority identified above.

The legislative history of the CDA provides a clear insight into the intent of Congress that "claim" must have the broadest possible meaning. Submission of a written claim and providing interest were specifically intended to encourage

early submissions and to induce prompt negotiated resolutions without litigation. In order to discern the broad form that Congress intended for the term "claim", one need only look to the related False Claims Act in which Congress defined "claim" as "any request or demand...for money or property." [31 U.S.C. § 3729(c)], which this Court defined as encompassing "all attempts to cause the Government to pay out sums of money" [United States v. Neifert-White Co., 390 U.S. at 233, 88 S.Ct. at 962].

The Federal Circuit's grant of blanket authority to the executive to restrictively define the content of "claim" raises an additional substantial conflict with another statute. Here, Essex submitted written requests for the payment of money, which set forth specific sums and recited that they were "claims" under the CDA and, when the specific sums required, included CDA certifications. Yet, the Court

below held that Essex's submissions are not "claims" as defined by the executive agencies. If another party made such a submission that was then established to be false or fraudulent, would the executive's restrictive "claim" definition and the Opinions below bar the executive's access to the False Claims Act or the CDA [41 U.S.C. §604] or provide a defense by that party to a false claim action the executive might attempt to bring?

The Court below upheld the agency's concept of requiring a dispute before the claim is presented even though the OFPP has explicitly taken the contrary position. On 28 January 1983, the OFPP declared that "The Act does not require that a claim be 'disputed by the other party', nor does it require that a claim be submitted under the "Disputes clause." [Appendix, hereto, pp. 75-76; Emphasis supplied]. Accordingly, the Federal Circuit has upheld an

interpretation that the agency itself has contradicted.

The Opinions below overlook or misapprehend the lack of a grant of legislative authority to the executive agencies and the resulting conflict with principles of legislative authority and the separation of powers [U.S. Constitution, Art. 1, Sec. 1 and 8] established by decisions of this Court and strictly followed in other decisions of the Federal Circuit itself.

These conflicts and contradictions with the Congressional purpose and intent justify the grant of certiorari to review the Opinions below.

2. The Executive's "Claim" Definition Applied by the Opinions below has Spawned "Vexatious" and "Ruinous" Litigation Having No Result Other than a Meaningless Frustration of Access to the Procedures and Rights Granted by Congress.

Only one term in the CDA was selected by the executive agency for an interpretive defini-

tion to be imposed on all Government contractors--the word "claim." The executive agency required that an impasse or dispute somehow exist before the existence of the claim itself and that the submission conform to a series of technicalities having nothing to do with the merits of the claim. The transparent reason for the agencies to pursue this course is found in recognizing that the existence of a dispute depends entirely upon the conduct of the agency. By the simple expedient of withholding an expression of actual disagreement, the executive agencies have produced contradictory board and court decisions all based on the agency's introduction of the inherently ambiguous concept that a "dispute" must somehow exist before the subject of the dispute has been presented in a claim. [See, i.e., citations in A & J Construction Co., Inc., IBCA No. 2269, 87-3 BCA ¶

19,965, at pp. 101,078-079; and Straga v. United States, 8 Cl.Ct. 61, 66-68 (1985)].

In the absence of guidance by this Court, every contractor who wishes to avail himself of the CDA faces the risk of being eliminated by boards or courts that have been blinded by the rhetoric in a flurry of motions based on pinning a "request" or "proposal" label on claims and imposing a "dispute" as a prerequisite. By not expressing a disagreement, the agencies thus control the timing of when, if ever, the merits of the contractor's rights will be resolved.

The Claims Court below relied only on a panel decision in Dawco Construction Co. v. United States, 930 F.2d 872 (Fed. Cir. 1991) to eliminate Essex. [Append. hereto, pp. 60-63, 72]. In viewing itself as bound by Dawco, the Claims Court below did not reference or address any part or aspect of the foregoing provisions of the CDA nor its legislative history. Dawco

was based only on selected phrases from "claim" definitions in three sequential "Disputes" regulation versions without regard for the agencies' lack of authority under the OFPP Act or the CDA to regulate any abnormal "claim" definition. The Claims Court below dismissed Essex because the element it considered as distinguishing a claim "is that negotiations had clearly been abandoned, and the amount claimed was definitely in dispute." [Appendix, hereto, p. 66; Dawco, 930 F.2d at 879; Emphasis supplied].

The holding that a contractor must refuse to negotiate in order to have a CDA claim is a direct contradiction of the legislative history which stresses the need to encourage prompt submission and settlement of claims and fixed the interest provision precisely for that purpose. The Opinions below thus adopt a truly ironic premise. By the simple expedient of

publishing an abnormal and self-serving definition of the familiar term "claim", the executive agencies successfully regained their superior bargaining power, particularly with respect to a small business such as Essex, by having total control over the existence of a "claim" and consequently the start of determining the merits of the claim and the start of the accrual of interest. The executive agencies have been thus permitted to turn the event selected by Congress to "provide a specific date from which interest will be paid" into a variable date and to turn the benefit intended to "serve as an incentive" for early submission and settlement of claims into an incentive to delay claim submittal and abandon settlement efforts. The Opinions below stand for the proposition that the contractor must refuse to negotiate and, perhaps, refuse to diligently proceed with performance resulting in a risk of a default, simply to avoid financing

increased costs ordered by the Government without the right to be paid the interest that Congress believed it had established more than fourteen years ago.

Despite the Federal Circuit's decision to use the technicalities in the agency's definition of "claim" rather than to directly address the Claims Court's reliance on the Dawco requirement to "abandon" negotiations and create a "dispute", the Federal Circuit's opinion nevertheless affirms the incongruous result that Congress somehow left a "black hole" or some "grey area" [Appendix, hereto, p. 73] through which a contractor's statutory rights against the executive can be arbitrarily avoided or eliminated by an executive's regulation.

Moreover, the Federal Circuit's failure to acknowledge and address the authority limitations in the OFPP Act and the intent and purpose of the CDA and its legislative history has

spawned Claims Court and administrative Board decisions that blindly apply the Opinions below and the executive's regulation with many conflicting, arbitrary and irrational results. Litigation over litigation has become the norm. The resolution of the merits of the private party's claims and rights is being repeatedly frustrated and avoided for months and even years by a diversion into the agencies' meaningless semantic conundrum of whether a claim is a "claim."

In Sun Eagle Corp. v. U.S., 23 Cl.Ct. 465 (1991), the Court rejected another contractor's CDA claim. Based on the premise that negotiations must be clearly abandoned, the Claims Court examined the record not to discern the merits of the claim, but rather to determine whether the parties were blatantly hostile and adverse on each issue comprising the submission in order to find a "claim." The result of the

Court's efforts was a conclusion that "...nothing in the record indicates that the parties viewed this item as nonnegotiable...[or] nothing in the record reflects either the contracting officer's or plaintiff's unwillingness to discuss this issue." Also, "...the last contact between the parties was an amicable September 14 letter from plaintiff..." Sun Eagle, 23 Cl.Ct. at 473. Almost three years after the contractor's written submission to the contracting officer, the Court's exploration into the "claim" definition arena in Sun Eagle thus provided no assistance to a resolution of the merits.

Conflicting with the Claims Court's comments in Sun Eagle, the Court in Isles Engineering & Construction, Inc. v. U.S., 26 Cl.Ct. 240 (1992), stated "the fact that plaintiff's May 9, 1988 letter also suggested the possibility or hope, for a negotiated solution to the dispute

did not detract from its validity of perfecting plaintiff's claim under the CDA." The court in Contract Cleaning, 811 F.2d at 592, "found that an expressed desire to negotiate a solution to the dispute did 'not mean that those letters did not constitute claims.'" Isles, at 243[7] Although the contractor's claim was preserved in Isles, the excursion into the "claim" semantics did not conclude until four years after the claim was submitted and only then was the contractor permitted to proceed to a resolution on the merits.

On the other hand, in B.F.S. Environmental Specialists, Inc. v. U.S., 23 Cl.Ct. 751 (1991), letters submitted by the contractor were not "claims" under the CDA. Although the first

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[7] But see Facilities Systems Engineering Corp. v. U.S., 25 Cl.Ct. 761 (1992)("dispute arises only when the parties have reached an impasse in their negotiations"); and CPT Corporation v. U.S., 25 Cl.Ct. 451 (1992)("claim" denied in part because the contractor indicated a willingness to continue negotiating).

request of November 9, 1988, was properly certified, the Court held that it was not a claim because of the "strong requirement that a request for payment be tangibly disputed." B.E.S., 23 Cl.Ct. at 753. The Court then observed that a "Feb. 27, 1989 letter from the contracting officer... specifically denied BES's request for payment. At this point, a bona fide dispute between the parties existed, satisfying the Dawco requirement." Id. at 753. Lastly, the Court considered "whether a viable claim was made after the dispute arose on Feb 27, 1989. BES submitted a letter to the EPA on July 6, 1989 asserting that its Nov 9 letter was a claim and requesting a final decision by the contracting officer. The July 6, 1989 letter was not certified." Id. at 753. In spite of the proper certification of the November 9, 1988 letter, and the Contracting Officer's complete denial, the Claims Court in B.E.S. held that "absent

certification, the July 6, 1989 letter does not constitute a CDA claim." Id. at 754. Thus, after almost three years, the contractor still had no decision on the merits of his claim and no interest for that period.

The same judge who decided Isles, supra, also authored CPT Corporation v. U.S., 25 Cl.Ct. 451 (1992). The contractor made a written submission to the contracting officer dated June 13, 1989, pursuant to the CDA, for an unpaid sum under the contract and requested a final decision. Almost three years later, on March 13, 1992, the Court applied the Claims Court Opinion below sua sponte to find no CDA "claim" even though the Government had not challenged CDA jurisdiction. CPT, 25 Cl.Ct. at 454. "The fact that a contractor 'referred to a submission as a claim, or treated it as such,' does not mean that the contractor's designation will have controlling legal significance. Essex Electro

Engineers, Inc., 22 Cl.Ct. at 759-760...Plaintiff's repeated invocations of the CDA and requests for written decisions were apparently tools to goad the government into action, rather than bona fide claims. Communications never ceased..." CPT, 25 Cl. Ct. at 455. In addition, a claim for interest under the Prompt Payment Act was made subject to the same "claim" definition applied to the CDA and letters demanding Prompt Payment Act interest were also found not to be "claims". Id., at 456.

The confusion and irrational results spawned by the Opinions below also extend to the Administrative Boards. In Essex Electro Engineers, Inc., ASBCA No. 40553, 91-2 BCA ¶23,712, the agency moved to dismiss alleging no "claim". Essex's written submission had been made to the contracting officer on August 19, 1987, and was certified as a CDA claim for $881,569. The appeal to the Board was filed March 9, 1990,

because of inaction by the agency. On January 10, 1991, the Board denied the motion to dismiss holding that "there are no 'magic words' that need be said" for a claim. Essex was finally allowed to proceed on the merits three and one-half years after the submission of its claim.

On the other hand, the same administrative judge that denied the motion in Essex, supra., granted a government motion to dismiss that was filed one week before the scheduled hearing in Heyl & Patterson, Inc., ASBCA No. 40604, 91-2 BCA 23,972. The contractor's written submission to the contracting officer dated March 23, 1988, included additional copies of an earlier "claim" of November 3, 1987, an addendum of January 28, 1988, and a certification as a CDA claim for $770,293. The Board's decision found the earlier certification of the November 3, 1987 claim inadequate because the word "supporting" was not included and ordered additional evidence

on the adequacy of the certification of the March 23, 1988, claim. The Board's next decision of July 31, 1991, granted the agency's motion and found no "claim"-- "a claim must seek payment of a sum certain as to which a dispute exists at the time of submission" [Dawco Construction Co., supra.]; "the parties must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise" [Essex Electro Engineers, Inc., supra., 22 Cl.Ct. 757 (1991)]; "A claim only exists when the parties clearly have abandoned negotiations and the amount is definitely in dispute" [Sun Eagle Corp., supra.]; "use of the term 'claim' does not, in the absence of other factors, render the...letter a claim" [Sun Eagle, supra.]; "submission of a certification, even one proper in form and execution, does not transform the...letter into anything more than a cost proposal" [Dawco,

supra.]; "Of course, the issuance of a 'final decision' by the contracting officer is no help where there is no CDA claim" [B.L.I. Construction Company, Inc., ASBCA Nos. 40855, 40856, 40977, 91-2 BCA ¶24037].

Thus, the existence of a "claim" was denied in Heyl & Patterson, supra., more than three years after the submission which had been certified as a claim thus proceedings on the merits of the claim were frustrated. See, also, Industrial Contractors, Inc., ASBCA No. 41613, 91-3 BCA ¶24,217 [Board's July 23, 1991 decision dismissed action on a June 27, 1989, submission with a CDA certification of $1,346,361, finding that the contractor's efforts seeking to pursue settlement negotiations did not preserve the existence of a "claim"]; Oman Fischbach International, ASBCA No. 41,474, 91-2 BCA 24,018 [Board's May 15, 1991, decision dismissed appeal on ground that the certified submission of

November 14, 1988, was not a "claim"; "we cannot regard either appellant's certification, or respondent's later characterizations of the submission as a claim, as dispositive"]; J.S. Alberici Construction Co., Inc., GSBCA No. 10482, 91-3 BCA 24203 [Board's July 15, 1991 decision found no "claim" in a "claim book" submitted in September, 1988, with a CDA certification of $3,093,585.61, and that the contracting officer's final decision was not authorized because negotiations had occurred]; Maitland Bros. Co., ASBCA No. 34632, 91-3 BCA ¶24,246 [After further briefing and argument, on July 22, 1991, the Board decided its own sua sponte question of its own previous decision that had sustained the Appeal on November 26, 1990, based on whether a "claim" had existed in the contractor's submission of March 13, 1986]; Interstate Contractors, Inc., VABCA No. 3404, 92-1 BCA ¶24,480 [contracting officer's final deci-

sion was found not valid because the contractor's submission of "listed charges" was not considered a "claim."]; Services Alliance Systems, Inc., ASBCA Nos. 43568, 43569, 43855-43856, 92-2 BCA ¶ _____ (1992 WL 84432) [On April 20, 1992, Board decided that "over two hundred" letters during 1990 protesting a diversion of work as violating contract terms were not claims because they "did not ask for money" and contractor's submission of February 8, 1991, for $243,463.12 with a proper CDA certification was not a claim because it was not the subject of a pre-existing dispute, therefore the contracting officer's final decision for a small fraction of the amount demanded was considered not valid and the Government motion to dismiss was granted].

Essex made written submissions to the contracting officer identified as claims under the CDA and certified as such when the specific

sum claimed exceeded $50,000 and the contracting officer understood, evaluated and, after many months and even years, eventually resolved Essex's submissions by entering settlements and making payments of the amounts found due. The "plain import" of the Contracting Officer's subsequent final decisions was a recognition that interest was due on proper CDA claims.

No reading of the CDA or its legislative history would countenance a necessity or requirement that the private party refuse to participate in settlement negotiations or otherwise participate in the creation of an impasse or dispute so that a CDA claim and the right to interest could be preserved. The Opinions below have spawned confused, conflicting and irrational decisions that are frustrating and avoiding a timely resolution of the merits of private parties' contract claims and are directly producing the "vexatious and...

oftentimes, ruinous litigation" about which this Court warned in the last claims guidance that was provided more than twenty years ago. S&E, supra. These irrational results produced by meaningless litigation justifies the grant of certiorari to review the Opinions below.

3. The Imposition of the Restrictive "Claim" Definition in the Agency's "Disputes" Regulation to Bar a Private Party's Access to the Procedures and Rights Afforded by Statute is a Denial of Due Process.

The executive's regulations that pertain to contracting with the Government are adopted in virtual secrecy as being exempt from the rule-making provisions of the Administrative Procedures Act ("APA") [5 U.S.C. § 553(a)(2)]. In spite of the specific limited authority delegated in the CDA, the executive agencies did not simply echo the statutory language, as had been done previously with the Wunderlich Act. The agencies decided, instead, to adopt a different

approach for a "Disputes" regulation to be imposed on contractors without notice or any hearing.

The abnormal "claim" definition drafted by the executive agencies can be found in no dictionary, is not used in the related "False Claims Act" and is in conflict with decisions of this Court addressing the term in related legislation. The agencies' drafted definition is inherently ambiguous as established by the past fourteen years of conflicting, contradictory, and confusing decisions by the boards and the courts. For this reason alone the regulation must be strictly construed against the drafter and governed by the plain and literal meaning of the "claim" and "interest" provisions in the CDA as intended by Congress. WPC Enterprises, Inc. v. United States, 163 Ct.Cl. 1, 323 F.2d 874 (Ct.Cl.1963).

Essex believed that its demands were CDA "Claims", certified as required, on which CDA interest was accruing. At all contemporaneous times until the agency embarked on its litigation position, the "plain import" of the contracting officer's actions was an admission that interest was due on the subject claims as proper CDA claims.

Perhaps more important is the recognition that the "Disputes" regulation purports to be a general policy statement mandated for all parties for which no authority has been vested under the specific provisions of the OFPP Act and the CDA. The Federal Circuit could point to no authority for the regulation other than by contradicting major decisions of this Court and the Federal Circuit itself, in finding an implication of authority in a general policy pronouncement of a section of the OFPP Act even

though it contained no reference whatsoever to the CDA.

The agency's definition that is beyond the scope of the statute and its history required rule-making procedures before it could be lawfully enforced. Exceptions to or exemptions from APA requirements must be narrowly construed. [See Vigil v. Andrus, 667 F.2d 931, 937 (10th Cir. 1982)]. The "contracts" exemption from rule-making requirements is not applicable where the issue is an agency's prospective changes to proscribed law or established policy as applied to the contents of all agreements entered by the Government with private parties. [See, 5 U.S.C.A. §§ 551(4), 553(a); National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger, 658 F.Supp. 48 (D.C Col., 1987):

> "As the definition indicates, APA 'rules' are characteristically of general applicability, and are prospectively effective. Rulemaking action by an agency generally

> does not apply previously set standards or policies to past facts or situations, but establishes a new standard or policy to apply to future facts. Rulemakings impose obligations on or affect groups, not only isolated persons. [citations omitted]." Id., at 53.

Where, as here, an agency takes action which prospectively affects the calculation and payment of Congressionally established rights or benefits, rulemaking requirements are applicable. [Id., at 54]. The failure of the executive agencies to comply with the rule-making procedures of the APA in either the drafting or application of their purported general policy regulation renders it unenforceable as a denial of administrative due process.

Blind application of the regulation to deny access to a procedure and right to interest that has been specifically granted by Congress is a denial of substantive due process as well. A denial of substantive due process is established if the party's liberty or property interests

have been invaded by government action without an opportunity to challenge that invasion and the purported justification for the invasion is improper. [U.S. Constitution, Amend. 5; Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp., 506 F.2d 467 (9th Cir. 1974).

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court described the kind of property interests protected by the due process clause:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' (408 U.S. at 577, 92 S.Ct. at 2709.)"

Finally, even if the agency "claim" definition could be viewed as validly within the "contract" exemption in the APA, the imposition of that definition as a bar to private parties' access to the procedures and rights afforded by the CDA is void as a denial of fundamental procedural

due process which has been unaffected by the APA. If the Opinion below is correct in contradicting the foregoing authorities by holding that "nothing in the APA limits the 'public contracts' exemption" [Appendix, hereto, p. 18], the fact remains that "Congress did not intend [the APA] to abolish procedural due process, but rather to enhance it..." Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1194 (D.C.D.C. 1975), affirmed, 539 F.2d 243 (D.C. Cir. 1976). Here, as in Northern California Power Agency, if the APA exemption is applicable, the "claim" definition was adopted by the agencies in a situation "[w]here procedures were not fixed...; where not all the important technical data ultimately relied on were made available for full public comment; where [agency] experts made off-the-record presentations to the decision-maker...; and where the decision-maker never spelled out a detailed rationale for

his decision...[thus] the meaningful opportunity to be heard required by due process was denied." Blind application of the regulation as a mandatory requirement is thus barred. Id., p. 1194-95.

Here, a contractor's right to interest on a claim, certified if required, during the period that he is required to proceed with performance of changed or additional work pending settlement and payment is specifically mandated by the CDA and its legislative history. A denial of this right by a non-statutory prerequisite for an undefined pre-existing "dispute", abandonment of negotiations, and semantic technicalities based on a regulation not subjected to due process safeguards is a clear invasion of interests established by Congress. The only "reason" that could exist for such an invasion is the unauthorized self-serving avoidance or reduction of the agency's

obligation to promptly proceed with settlements and to pay the Congressionally established benefit, thus violating the mandates of Congress.

This consummate denial of due process justifies the grant of certiorari to review the Opinions below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

By: _____

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August 10, 1992

APPENDIX

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UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES
Defendant-Appellee

Decided: April 17, 1992

Before ARCHER, Circuit Judge, BENNETT, Senior Circuit Judge, and MICHEL, Circuit Judge.

Essex Electro Engineers, Inc. appeals the summary judgment of the United States Claims Court denying Essex's claim for interest under the Contract Disputes Act (CDA). Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991). The Claims Court held that Essex's submissions were not CDA claims entitling Essex to interest because there was no dispute at the time they were made. However, we hold that the submissions are not claims because they did not

seek a sum certain as a matter of right as required by the Federal Acquisition Regulation (FAR) which implements the CDA. Nevertheless, because the Claims Court correctly concluded that the government was entitled to judgment as a matter of law, we affirm.

I. BACKGROUND

Essex contracted with the Naval Regional Contracting Center to overhaul and reconfigure 122 mobile electric power plants. Three change orders were issued during performance of the contract. The principal amounts due to Essex under the three change orders have been paid as a result of an administrative settlement. Essex now seeks interest on those amounts from the date it made submissions purporting to be claims under the CDA.

A. The 100 Percent Replacement Parts Change Order

The first change order required that certain parts be subject to a 100 percent replacement requirement. In response to a letter from the Administrative Contracting Officer (ACO) requesting a cost proposal for such a change, Essex submitted a cost proposal on February 14, 1986. On October 7, 1986, without ruling on Essex's proposal, the ACO unilaterally executed the change order which provided that "[a]n equitable firm-fixed price for this change order shall be negotiated with an appropriate Supplemental Agreement."

On April 13, 1987, Essex submitted a revised cost proposal which reduced the amount proposed earlier and noted that

> prices are based upon purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be.

Although the letter contained a certification in the form required by section 605 of the CDA, it did not request a final decision by the ACO.

In February 1988, the parties "definitized" the change order by executing an amendment to the contract. The "firm-fixed price" for the change order that was agreed to was less than that offered by Essex in its revised proposal. Upon Essex's submission of an invoice for the amount due under the amendment to the contract, the government made payment on March 14, 1988.

On May 25, 1989, Essex sent a letter to the ACO which purported to be a "claim for interest due on the payment made on the certified claim arising from the referenced Change Order. We request your final decision on this claim within sixty days in accordance with the [CDA]." Essex based this claim for interest on its April 13, 1987 submission of a revised cost proposal and

requested interest for the period commencing with that date.

Without determining whether the April 13, 1987 submission was a CDA claim, which would entitle Essex to interest, the ACO allowed a limited amount of interest. Elaborating on the interest provision of the CDA, the FAR allows "interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim . . . or (b) the date payment otherwise would be due, if that is later . . . ." 48 C.F.R. § 33.208 (1991). Because payment ordinarily would be due 20 days after receipt of an invoice, and because shipment preceded the invoice, the ACO calculated interest for each shipment for the period beginning 20 days after acceptance of the shipment until final payment. To arrive at the final interest amount due, the ACO also credited progress payments to the principal payments as

they came due. The final interest amount found to be due, however, has not been paid by the government.[1]

B. THE SUPPORT EQUIPMENT CHANGE ORDER

The same basic sequence of events occurred with respect to the second change order. On April 23, 1986, the ACO issued a unilateral modification to the contract. This change order required that the contractor furnish material, parts, labor and services for the incorporation of "winterization kits" into each of the mobile power plants. It also required that Essex submit a price proposal within 30 days. The record is unclear as to whether a submission was made immediately following the change order; however, on April 15, 1987, Essex submitted a

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[1]After his final decision, the ACO modified the base against which interest was calculated. The interest amount originally found to be due, $1,086, was increased to $4,630.87.

"revision to our estimated cost proposal submitted . . . 19 June 1986." Once again, the letter stated that prices were based upon

> purchased orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be.

This letter held itself out to be a "claim" and was certified. It was never decided by the ACO. However, after an audit and several days of price negotiation, the parties executed an amendment on March 2, 1989. Upon Essex's submission of an invoice to the government for the amount due under the amendment to the contract, it received payment on March 16 or 17, 1989.

On May 2, 1989, Essex sent a letter to the ACO which held itself out to be a claim for interest under the CDA on the settlement sum. Essex based this claim for interest on its

revised cost proposal dated April 15, 1987. Once again, without ruling on whether the April 15, 1987 letter constituted a claim, the ACO allowed a limited amount of interest calculated from 20 days after shipment. This interest has not been paid.

C. THE "OVER AND ABOVE" WORK CHANGE ORDER

On September 24, 1986, the ACO issued another unilateral modification to the contract. This change order allowed the contractor to "propose additional repairs and reconfigurations to the mobile power units beyond those contemplated by the original contract." Essex, 22 Cl. Ct. at 762. Under this amendment, Essex submitted inspection reports which included proposals for "over and above" work on each unit. Each proposal indicated what the additional costs for repairs would be and requested government approval to proceed with the additional work.

For all "over and above" work proposed by the contractor that was authorized by the government, the price was later definitized.

The inspection reports prior to the March 27, 1987 report were not themselves labeled as "claims"; however, in a letter dated January 26, 1987, Essex referred to all of the prior inspection reports as claims. The March 27, 1987 report, and all subsequent reports, were characterized on their face as "claims." However, none of the reports demanded a decision by the ACO as all were mere proposals for additional work.

Because the government approved of the work proposed in the March 27, 1987 inspection report, price negotiations were initiated. These negotiations resulted in the execution of a bilateral modification to the contract establishing prices for the "over and above" work involved. Similarly, thirteen additional bilat-

eral modifications resulted from the over and above work proposed in subsequent inspection reports.

By letter dated April 13, 1987, the ACO informed Essex that the additional work set forth in the inspection reports could not yet be the subject of a claim since there was not dispute. On May 16, 1989, Essex submitted a claim for interest on the additional cost for the over and above work. The ACO never issued a decision on this claim. No interest amount was ever paid.

On April 5, 1991, Essex filed suit in the Claims Court seeking interest on the principal amounts due under the three change orders. Essex maintained that the interest should be calculated from the date it made submissions purporting to be claims under the CDA. The Claims Court held that Essex's submissions were not CDA claims entitling Essex to interest

because there was no dispute at the time they were made. In a motion for reconsideration of the Claims Court's judgment, Essex requested that it be allowed to amend its complaint to proceed under the Prompt Payment Act. The Claims Court held that the motion should be treated as a motion to amend but that it was untimely because it was filed after entry of judgment.

II. ISSUES PRESENTED

A. Does the executive branch have regulatory authority to define "claim" under the Contract Disputes Act?

B. Is the regulatory definition consistent with the statute and reasonable?

C. Has the regulation been properly applied in this case?

D. Did the Claims Court abuse its discretion in denying Essex's post-judgment motion to

amend its complaint to incorporate the provisions of the Prompt Payment Act?

III. ANALYSIS

A. Regulations Are Authorized by Statute

Essex argues that subsection 405(g) of the Office of Federal Procurement Policy Act (the "OFPP Act") limits the executive's authority to issue regulations to only those areas specified; and therefore, since the OFPP Act does not specify the CDA, the executive does not have authority to issue any regulations affecting the CDA. Subsection 405(g) of the OFPP Act states that "[e]xcept as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator [of OFPP]." 41 U.S.C. § 405(g) (1988).

Although the OFPP Act does not explicitly mention the CDA, subsection 405(a) of the Act nevertheless does broadly authorize the executive to issue regulations, including regulations affecting the CDA. Subsection 405(a) provides: "[T]he Administrator [of OFPP] may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed be executive agencies . . . ." 41 U.S.C. § 405(a) (1988). By its very terms, the CDA applies to contracts involving government procurement.[2] Accordingly, the executive,

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[2]Section 602 of the CDA, entitled "Applicability of law," provides:

> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract . . . entered into by an executive agency for --
>
> (1) the procurement of property, other than real property in be-

(continued...)

specifically the OFPP, does have authority to issue regulations implementing the CDA, and that authority is broad enough to encompass regulations defining "claim."

B. The Applicable Regulation Is Consistent with the CDA

Having determined that the OFPP has authority to issue the regulations, we must then determine whether the governing regulation as issued is consistent with the statute. In so doing, we must give deference to the interpretation of the statute of the agency charged with implementing it. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467

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[2](...continued)
ing;
(2) the procurement of services;
(3) the procurement of construction, alteration, repair or maintenance of real property; or,
(4) the disposal of personal property. 41 U.S.C. § 602 (1988).

U.S. 837, 842-43 (1984). If the agency's interpretation of the statute as set forth in the regulation is reasonable, ordinarily it must be upheld. Id. at 844.

The statutory section at issue provides:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached and shall inform the contractor of his rights as provided in this chapter.

41 U.S.C. § 605(a) (1988). Included among the provisions of the FAR issued by the OFPP to implement this statutory section is a definition of the term "claim":

> Claim, as used in this subpart, means a written demand or written assertion by one of the contracting

> parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment of interpretation of contract terms, or other relief arising under or relating to the contract.

48 C.F.R. § 33.201 (1991).

Accordingly, with respect to a claim for money, three requirements are set forth in the regulation, all of which must be met for a submission to constitute a "claim": (1) the demand or assertion must be in writing, (2) the money must be sought as a matter of right, and (3) the writing must set forth a sum certain. As for the requirement that the claim be submitted in writing, the statute itself expressly requires a written submission.

The second two requirements are consistent with the ordinary plain meaning of the term "claim." The Webster's Ninth New Collegiate Dictionary (1990) defines claim as "to ask for especially as a right." Thus, the dictionary definition of "claim" supports the reasonable-

ness of the requirement that the money be sought as a matter of right. Moreover, for a payment of money to be sought as a matter of right, a sum certain naturally must be asserted. It is, after all, the defining measure of that right. Because neither the statute nor its legislative history otherwise defines "claim" or suggests that the word is intended to have some meaning other than its ordinary plain meaning, the FAR definition is reasonable, and must be upheld.

Essex next argues that because the executive failed "to comply with their rule-making procedures of the Administrative Procedures Act in either the drafting or application of [the regulations]," it has been denied "administrative due process."[3] But the Administrative

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[3]Essex also argues that the regulations are inherently ambiguous because subsequent language allows for an interpretation requiring a dispute for entitlement to interest. Essex alleges that it has a property right to interest on a

(continued...)

Procedures Act (APA) expersly exempts from its application "a matter relating to . . . public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (1988). Essex maintains that this exemption does not apply because the regulation at issue applies not only to procurement contracts but also to the contents of all agreements entered into by the government with private parties. This argument is unpersuasive because nothing in the APA limits the "public contracts" exemption, and the CDA plainly concerns, inter alia, government procurement contracts. Thus, in promulgating the FAR regulations, the executive was not required to follow APA requirements.

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[3](...continued)
claim and that it has been denied substantive due process because of the additional "dispute requirement" for entitlement to the interest. Because no "dispute requirement" is applied by us in the instant case, see infra, we need not address this argument.

C. The FAR Was Applied Properly in this Case

Essex seeks interests on amounts found due and paid as a result of the three settlement agreements. Essex alleges that the government owes it interest from the date it made submissions which purport to be, or which were later characterized by Essex as, "claims" under the CDA. With respect to the 100 Percent Replacement Parts Change Order and the Support Equipment Change Order, Essex alleges that its revised cost proposals dated April 13, 1987 and April 15, 1987, respectively, were claims entitling it to interest. With respect to the "Over and Above" Work Change Order, Essex alleges that each of its inspection reports was a claim entitling it to interest.

The CDA allows "[i]nterest on amounts found due contractors on claims . . . from the date the contracting officer receives the claim pursuant to section 605(a) of this title from

the contractor until payment thereof." 41 U.S.C. § 611 (1988). Thus, a necessary predicate to entitlement to interest is the submission of a claim.

To determine whether the submissions purporting to be claims did constitute claims under the CDA, we must ascertain whether the requirements of the statute and the FAR were satisfied. The statute requires that the claim be submitted in writing and that it be submitted to the contracting officer for a decision. 41 U.S.C. § 605(a). While the submissions at issue clearly satisfy the first requirement of a writing, it is not clear whether the second requirement is satisfied. The statute does not make clear whether a request for a decision must be made explicitly or whether it may be found implicit in the writing. We do not need to answer this question, however, because it is

clear that the FAR's requirements for a claim are not met by any of the submissions at issue.

In addition to the writing, the regulations require that a sum certain be sought as a matter of right. Because the April 13, 1987 submission for the 100 Percent Replacement Parts Change Order and the April 15, 1987 submission for the Support Equipment Change Order were mere "proposals" for "work to be performed," neither of these submissions asserted anything as a matter of right.

Likewise, the inspection reports submitted pursuant to the "Over and Above" Work Change Order, did not seek a sum certain as a matter of right. The reports served merely to propose additional repairs for possible approval by the government. As such, payment for any services subsequently approved could not possibly have been asserted as a matter of right in these reports.

Because the April 13, 1987 and the April 15, 1987 revised cost proposals and the inspection reports did not seek a sum certain as a matter of right, they were not claims under the CDA. Although the Claims Court used a distinctly different analysis to find that the submissions were not claims, the Claims Court judgment must be affirmed because its conclusion that interest must be denied was proper.

The Claims Court relied on Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), to determine that the submissions were not claims under the CDA. Essex argues that the court's reliance on Dawco was improper because neither the CDA nor its legislative history supports Dawco's requirements that the contractor refuse to participate in settlement negotiations or otherwise create a dispute before a CDA claim can exist and the right to interest is preserved.

Where, as here, the first three regulatory requirements themselves are not met, there is no need to discern whether a dispute exists. Here, considered against the first three FAR requirements, the submissions clearly are not claims.

Essex also argues that the ACO made a binding concession that the April 13, 1987 and the April 15, 1987 submissions were "claims" by allowing some interest on them. Essex asserts that this concession should entitle it to interest on those claims just as the government attorney's concession in Dawco entitled Dawco to interest on admitted claims. This argument is not persuasive. The submission in Dawco that was conceded by the government to be a claim was not in the record before the Federal Circuit or the Claims Court. Dawco, 930 F.2d at 879. In determining whether the absent submission was a claim, the Federal Circuit considered both the government's statements regarding the submission

and the description of the submission found in the record. Id. The government's "concession" was not dispositive of the issue, but merely provided additional evidence on which to base a decision. Moreover, that the government is bound by concessions in court of its attorneys does not mean it must also be bound by pre-litigation viewpoints of its contracting officer, who never addressed whether the submission was a "claim."

In the instant case, however, the submissions at issue are in the record. The trial judge independently assessed the adequacy of the submissions as "claims." In any event, the ACO's decision to allow interest that the government then refused to pay cannot be properly characterized as a "concession" by the government as a contracting party. Moreover, before the Claims Court and this court, the

government has consistently denied the existence of any claims.

D. Motion to Amend Complaint

In motion for reconsideration of the Claims Court's grant of summary judgment, Essex requested that it be allowed to amend its complaint to proceed not under the CDA but under the Prompt Payment Act (PPA), 31 U.S.C. § 3901, et seq. (1988). The Claims Court held that the motion should be treated as a motion to amend but that it was untimely because it was filed after entry of judgment.

On appeal, Essex argues that it had implicitly moved to amend its complaint prior to judgment. In support of this argument, Essex points to portions of the hearing record in which during argument on the motion the trial counsel discussed the PPA. Essex argues that those references to the PPA "should have been

construed as a motion to amend." Because no responsive pleading had yet been filed, Essex argues that it should be entitled to amend its complaint once as a matter of right. See RUSCC 15(a).

The Claims Court ruling must be upheld. Most importantly, a motion to amend made in the motion for reconsideration is clearly untimely. Id. Furthermore, Essex's "implicit motion" argument is unpersuasive. First, if Essex wanted to amend at that time, it could have either filed an amended complaint as a matter of right or requested leave of court to do so. Id. It failed to do either. Second, Essex has pointed to no authority, and we have found none, that requires the court to construe oral references to a particular statute during a hearing as a motion to amend the complaint. Indeed such a rule would make a mockery of pleadings and confront adverse parties with the potential for

endlessly shifting grounds. We will not condone this practice. Accordingly, the judge did not abuse his discretion in denying Essex's post-judgment motion to amend.

CONCLUSION

The executive branch has authority to issue regulations implementing the Contract Disputes Act, including OFPP's regulation defining the statutory term "claim." The regulatory definition of "claim is consistent with the ordinary plain meaning of the word, is otherwise consistent with the statute, and is reasonable. Because the submissions in this case do not satisfy all of the FAR's requirements for a claim, they were not claims. Accordingly, Essex is not entitled to interest based on these submissions. The grant of summary judgment of

no liability for the interest was therefore correct as a matter of law.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR

THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

Before ARCHER, Circuit Judge, BENNETT, Senior Cirucit Judge, MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration. The mandate will issue on May 19, 1992.

FOR THE COURT

Dated: May 12, 1992

Francis X. Gindhart
Clerk

cc: CHARLES E. RALEY
JOAN BERNOTT

ESSEX ELECTRO ENG V US, 91-5096
(CLM - 90-174 C)

****
* Note: Pursuant to Fed. Cir. R. 47.8, this *
* order is not citable as precedent. It is *
* a public record. *
****

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

91-5096

ESSEX ELECTRO ENGINEERS, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

A suggestion fo rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

_____
Francis X. Gindhart
Clerk

Dated: May 26, 1992

cc: CHARLES E. RALEY
JOAN M. BERNOTT

ESSEX ELECTRO ENG V US, 91-5096
(CLM 90-174 C)

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*
* Note: Pursuant to Fed. Cir. R. 47.8, this *
* order is not citable as precedent. It is *
* a public record. *
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IN THE UNITED STATES CLAIMS COURT

No. 90-174C
(Filed: April 5, 1991)

* * * * * * * * * * * * * * * * *

ESSEX ELECTRO ELECTRO ENGINEERS, INC.,

Contracts; Disputes Act; Whether a claim must involve a dispute; Interest as a basis for CDA claim.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * *

Charles E. Raley, Washington, D.C., for plaintiff. James S. Phillips, of Counsel.

Joan M. Bernott, with whom were Assistant Attorney General Stuart M. Gerson and David M. Cohen, Washington, D.C., for defendant. James P. Fuerstenberg, Office of Defense Logistics Agency, of counsel.

OPINION

BRUGGINK, Judge.

Defendant has filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, to consolidate with this proceeding two appeals pending before the Armed Services Board of Contract Appeals ("ASBCA"). Also pending are plaintiff's motion for summary judgement and its motion for sanctions. The principal sums due to plaintiff under three change orders have been paid as a result of administrative settlement. This action concerns plaintiff's attempt to recover interest on those settlement sums from the date it made submissions purporting to be claims under the Contract Disputes Act ("CDA").[4] The issue is whether

[4] 41 U.S.C. §§ 601-613 (1988).

plaintiff's submissions constitute claims cognizable under the act. Defendant contends that there was no dispute between the parties at the time plaintiff submitted its claims, and therefore the submissions were of no effect for purposes of commencing the running of CDA interest. For the reasons which follow, the court concludes that claims were not submitted, and that defendant's motion to dismiss, which will be treated as motion for summary judgement, is thus due to be granted. Defendant's motion to consolidate is denied. Plaintiff's motion for summary judgement and its motion for sanctions are denied.

FACTUAL BACKGROUND

Although defendant's motion is cast as one pursuant to RUSCC 12(b)(1), dismissal for lack of subject matter jurisdiction, the Federal Circuit has recently taught that a contention that an action is barred by the one year limita-

tions period does not raise a question as to the court's subject matter jurisdiction, but rather suggests that plaintiff has not stated a claim upon which relief can be granted. Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991). The same rationale would apply in the present circumstance. There is no question that the court has jurisdiction over claims brought under the CDA. The question is whether the facts alleged would constitute an actionable claim. Accordingly, defendant's motion will be treated as brought under RUSCC 12(b)(4). Since defendant has submitted materials outside the pleadings, its motion will be considered under RUSCC 56. Plaintiff has filed a motion for summary judgment with extensive exhibits. Defendant has responded to the motion and has offered numerous exhibits of its own along with an affidavit. The court concludes that the

issues are joined and can be completely disposed of on summary judgment.

After carefully examining the parties' submissions, including defendant's exceptions to plaintiff's proposed findings of fact, the court finds the facts to be as further described herein. The facts found are not controverted, and thus can form the basis for addressing the cross-motions for summary judgment.

While recognizing that the primary issue is whether the submissions at issue were "claims," the court will refer for convenience to those submissions in the same way plaintiff did at the time. The fact that plaintiff referred to a submission as a claim, or treated it as such, does not mean the court accepts that designation as having controlling legal significance.

The claims at issue arise from a single contract. On July 26, 1985 Essex Electro Engineers, Inc. ("Essex") agreed with the Naval

Regional Contracting Center[5] to overhaul and reconfigure 122[6] of the Navy's mobile electric power plants. During contract performance, several change orders were issued. The three claims at issue each relate to a particular type of increase in the contract work requirement brought about by these change orders, and the following discussion will track their separate chronologies. What all three share is a common assertion that an Essex submission to the Administrative Contracting Officer ("ACO") during implementation of the change orders constituted a claim within the meaning of the CDA, and thus began to accrue interest.

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[5]The procuring entity subsequently changed to the Naval Air Engineering Center. Both entities will be referred to throughout as "the Navy."

[6]The Navy terminated three units for its own convenience. Claims arising out of that partial termination are pending before the ASBCA.

1. The 100 Percent Replacement Parts Change Order

On November 20, 1985, the ACO sent a letter to Essex asking it to submit a cost proposal for a change order that would modify the contract to specify that certain listed parts would be subject to a 100 percent replacement requirement. The Navy specifically asked Essex to "furnish a cost proposal, for the inclusion of listed items into subject contract . . . . " Essex responded on February 14, 1986 with a letter from its President, F.J. Pawlowski. He wrote that "we are herewith submitting our estimated cost proposal [per unit] for the items to be added to the 100 percent Replacement Items Listing. . . . Please issue a contract change to incorporate selling price into the contract."

On October 7, 1986, the ACO unilaterally executed a change order, A00004, directing the addition of the 100 percent replacement parts

list. Price was to be negotiated: "An equitable firm-fixed price for this change order shall be negotiated with an appropriate Supplemental Agreement." The effective date of the change order was October 3, 1986.

On April 13, 1987, Essex submitted a revision to its earlier cost proposal. The revised cost proposal reduced somewhat the overall per unit cost for the change order. The letter from Pawlowski noted that "prices are based upon purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor and engineering time and cost will be." The letter demanded the sum of $448,746.50, and closed with a certification paragraph plainly drafted to conform to the CDA. The letter also recites that "Essex's rights to a delay claim are reserved." Enclosed with the letter was a

Form 1411, "Contract Pricing Proposal Cover Sheet." The letter did not specifically call for a final decision by the ACO.

In February 1988, the parties executed an amendment to the contract (amendment A00026), which "definitized" change order A00004. The parties agreed on a "firm-fixed price" for the change order of $339,429. The substance of what was required, i.e., the replacement parts list, was the same as that set forth in A00004. The effective date of the amendment was set as December 31, 1987. In a separate but contemporaneous letter, Essex notified the Navy that its agreement to the amendment was without prejudice to its position that "government actions, inaction, and changes have delayed contract performance, and Essex has consistently reserved its delay and disruption costs in negotiating equitable adjustment settlements." The ACO agreed to this reservation of rights.

On February 29, 1988, Essex submitted an invoice for the entire amount of the amendment. Payment was made on March 14, 1988.

On May 25, 1989, Essex mailed a letter to the ACO which held itself out to be a "claim for interest due on the payment made on the certified claim arising from [Change Order A00004]. We request your final decision on this claim within sixty days in accordance with the [CDA]." The substance of the four-page submission was that Essex was entitled to interest on the entire amount invoiced as of April 13, 1987, the date of the revised cost proposal/claim. The amount claimed was $27,486.82.

By letter of July 27, 1989, the ACO indicated that a final decision was being prepared, but that Essex had to submit certain additional information. Essex responded timely but, for aught that appears, did not furnish any of the information requested.

On October 20, 1989, the ACO issued a final decision on the claim for interest. The decision granted a limited amount of interest based on the disputes clause in the contract, which allowed interest on claims "on the amount found due and unpaid from (a) the date the contracting officer receives the claim . . . or (b) the date payment would otherwise be due, if that date is later . . . ." 48 C.F.R. § 33.208 (1985) (Federal Acquisition Regulation ("FAR")). The ACO noted that Essex began incremental shipments of units on May 7, 1987, and completed shipments on March 15, 1989. Out of the conviction that, under ordinary circumstances, payment would have been due 20 days after acceptance of the shipment until final payment, which occurred on March 14, 1988. Because there had been interim progress payments, moreover, the ACO credited those payments to principal payments as they came due. A total of $1,086 was allowed.

The ACO decision lists dates of delivery for the units. Delivery began May 7, 1987 and continued until March 15, 1989, by which time all units had been delivered.

The ACO decision was subsequently modified on February 20, 1990. The method if calculating interest remained the same, but the base against which it was assessed increased. The revised amount of interest allowed was $4,630.87. That amount has not been paid.

2. The Support Equipment Change Order

On April 23, 1986, the Contracting Officer issued unilateral modification P00002. The purpose of the modification was to require the contractor to furnish material, parts, labor and services for the incorporation of "winterization kits" into each of the mobile power plants. It recited that it was an "unpriced Modification with a maximum amount of $581,940." The ACO was

delegated authority to negotiate an equitable firm-fixed price for the change order although the modification went into effect immediately.

The modification called for submission by Essex of a price proposal within 30 days. It was anticipated that after various negotiation steps a final modification, with price, would occur within 150 days of receipt of the proposal. Essex proceed to incorporate the kits into the units.

The documents and proposed findings do not make clear what occurred between April 23, 1986 and April 15, 1987. On the latter date, Essex submitted a "revision to our estimated cost proposal submitted . . . 19 June 1986." The letter recites that prices are based upon "purchase orders and cost estimates. The engineering and labor hours are estimates based on our experience in reviewing the work to be performed and estimating what the direct labor

and engineering time and cost will be." The letter purported to be a claim and was certified by Essex, acting through President Pawlowski. He further recited that, because more than 150 days had elapsed since the contractor had submitted its cost proposal, Essex was no longer bound by the maximum amount of $581,940. Attached to the letter was an executed Form 1411, "Contract Pricing Proposal Cover Sheet." The total amount claimed was $720,546.91

Defendant performed an audit of the April 15 claim and issued it on December 23, 1987. After four days of negotiations, the parties agreed to an equitable adjustment in the amount of $629,000. Essex's acceptance, dated August 24, 1988, specifically reserved its "claim for delay and interest." In Amendment A00029, which was executed on March 2, 1989, the parties recited that all quantities had been delivered, with certain minor exceptions, and that claims

for delay and interest were preserved. Essex sent an invoice on February 6, 1989 in the amount of $603,851.04 for 117 winterization kits previously shipped and accepted. It received payment on March 16 or 17, 1989.

On May 2, 1989, Essex wrote a letter to the ACO claiming interest under the CDA on the settlement sum, commencing on April 15, 1987 and running until payment. The total amount of interest claimed as of that date was over $115,000. On February 20, 1990, the ACO wrote a "final decision" letter allowing interest on the same basis as that allowed with respect to the replacement parts change order. The result was that interest was calculated from 20 days after shipment, regardless of the fact that the shipments were not invoiced until much later, and ended when payments were made. Total interest allowed was $22,989.32. That amount has not yet been paid.

Essex's present claim is for approximately $125,000 in interest, which includes interest on the amount of the change order between April 15, 1987 and final payment in March 1989, along with interest on the interest allowed by the February 20 decision.

3. The "Over and Above" Work Change Order

On September 24, 1986, the ACO issued a unilateral modification to the contract, P00004. The total quantities under the contract were unaffected, but the work to be performed had the potential thereafter to increase. The amendment provided that the contractor could propose additional repairs and reconfigurations to the mobile power units beyond those contemplated by the original contract. If the "over and above" work was subsequently authorized, the price of the work would later be definitized.

Essex submitted an inspection report and a proposal for over and above work on each unit. Some reports dealt with several units. Apparently the unilateral modification of September 24, 1986 was in recognition of an ongoing practice because the first inspection report is dated February 13, 1986. It is typical of approximately half the reports: "In accordance with the contract, enclosed herewith is the Inspection Report for Serial [Unit] No. 4215. The additional cost for repair is $5,074.76. May we please have your approval so that we can start the work." The Government conducted price analyses on the proposals and presumably authorized additional work in each instance.

On January 26, 1987, Essex wrote the ACO concerning upcoming negotiations to price over and above work authorized up to that date. In his letter, President Pawlowski refers to the inspection as "claims."

Twenty-seven of the reports, beginning with the report of March 27, 1987, use language different than that of the first series of reports: "In accordance with the contract, enclosed herewith are Inspection Reports which contain a claim for equitable adjustment pursuant to the Contract Disputes Act. Reports and claims are submitted for the following [five] units." None of these reports are certified and none specifically call for an ACO decision on a claim. A comparison of the delivery dates with the dates of reports on the various units, as well as the working of the reports/claims, makes clear that at the time the reports were submitted, delivery could not have taken place. It is obvious that they are requests for permission to proceed with work. Most of the deliveries took place over several months and in many cases over a year after the dates of the reports.

Negotiations on pricing resulted, on May 6, 1987, in a bilateral modification to the contract (A00010) adjusting the price upward by $2,887.42 to cover additional work on the five units covered by the March 27 report. Subsequently, 13 additional bilateral modifications were executed reflecting agreement on pricing the over and above work for the remaining units.

The ACO responded to the March 27 report/claim with a letter dated April 13, 1987. The change in character of the inspection reports confused the ACO and led her to assert that the additional work could not yet be the subject of a claim since there was no dispute.

On May 16, 1989, Essex submitted a claim for interest on the over and above claims, in the total amount, at that time, of $103,991.40. The ACO indicated on two occasions that a final decision would be forthcoming on the interest claim, but no decision has been issued.

DISCUSSION

The plain import of the ACO's decisions with respect to the first two change orders is that she treated the April 13 and April 15, 1987 submissions, as well as the subsequent, separate interest claims, as claims under the CDA. Otherwise her reliance on the contract clauses relating to disputes and interest on claims would not have been relevant. She determined, in effect, that these submissions were claims, but held that interest would run only from the dates that interest would otherwise have been due under the contract. This analysis is based on FAR 52.233-1:

> (g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment.

The context of this excerpt from the disputes provisions makes it plain that interest only

comes into play if there is a claim under the CDA. The ACO's final decision awards interest based on alternative (2) of the interest clause because, under the contract, payment would not have been due until delivery and acceptance of the power units. The payments clause of the contract, taken from FAR 52.232-1, provides,

> The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.

The contract also permits a 20 day grace period as a prompt payment discount. Based on the uncontested dates of delivery and acceptance, as well as the referenced contract provisions, the ACO calculated interest to begin running 20 days after acceptance even though invoices were not submitted at that time. As the ACO pointed out, invoices were not submitted because the prices for the changes had not been

definitized, due to no fault of Essex. Essex did not invoice the cost increases on these two change orders until virtually all deliveries had been completed. The ACO made the judgement, which the court finds eminently reasonable, that she would treat the invoices dated nunc pro tunc to the various dates of acceptance.

It did not become clear until oral argument, however, that the Government does not wish to defend the ACO's analysis with respect to the first two change orders. Counsel argued that since valid claims had not been submitted, the disputes clause should not be invoked. Moreover, the Government took the position as a matter of contract interpretation that any payment on the settlement prior to the final invoice date was improper.

To take the last contention first, the court disagrees as a matter of contract interpretation that the ACO incorrectly construed the

payment clause. The contract must be construed against the Government as drafter. The court finds that it would not have been within the contemplation of the parties that the requirement of an invoice would preclude an obligation of payment when delivery has been made and accepted, while the parties are delaying final price adjustment during negotiations, and while the government is analyzing pricing data. To hold otherwise would mean that a contractor would be obligated to finance government inventory for substantial periods of time due to a government-initiated change order.

The question then becomes, under any set of circumstances, would Essex have been entitled to interest from the submissions of the April 13 and April 15, 1987 letters relating to the replacements parts change order and the support equipment change order? (The court will deal separately with the amendments related to over

and above work.) As to these two change orders, it is theoretically not necessary, in disposing of plaintiff's claim for additional interest, to determine whether the April submissions were claims. It is the court's view that on if they were claims, the ACO correctly construed the statute and applicable FAR provisions to begin the commencement of interest with the date payment would otherwise be due under the contract (plus the 20 day prompt payment period).

During oral argument, however, plaintiff made it clear that in its view the entire quantum of the change order price adjustments was due immediately upon receipt of the April submissions, even if work had not commenced, much less delivery completed. To accept this argument would normally result in a windfall to the contractor. Interest under the CDA was meant to encourage prompt dispute resolution by having the Government compensate for use of the

contractor's money, not to punish the Government. See S. Rep. No. 1118, 95th Cong., 2d Sess. 32 (1978), reprinted in 1978 U.S. Cod Cong. & Admin. News 5235, 5266.[7]

Even though plaintiff's claims for additional interest on the underlying change order claims can be disposed of whether or not the claims were valid under the CDA, it becomes necessary to address that question for two other

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[7]The FAR provisions defining a claim clearly contemplate that a claim can arise in the absence of a presently due and owing sum of money. See FAR 52.233-1. The complement to that definition is found in the interest clause, however, which provides that interest should not be due on a claim any earlier than would normally be the case under the contract payment provisions. It is necessary for the court to address the question of whether a CDA claim in this tribunal must be monetized. Compare Continental Heller Constr. v. United States, 21 Ct. Ct. 471 (1990): Frawley v. United States, 14 Cl. Ct. 766 (1988); and Citizens Assocs., Ltd. v. United States, 12 Cl. Ct. 599 (1987) with Atkins Enterprises, Inc. v. United States, 15 Cl. Ct. 644 (1988). In the present circumstances, the obligation for payment had already arisen under the contract.

reasons. The first is that the primary basis of defendant's motion is that the submissions at issue were not claims within the meaning of the CDA, because at the time they were submitted, there was no dispute between the parties. The second reason, which will be addressed separately, is the fact that Essex submitted independent claims for interest. For those claims to have any validity, there must have been underlying quantum claims that triggered an obligation to pay CDA interest.

The CDA does not define the term "claim." It does, however, provide some guidance as the form in which a claim should be submitted. Section 6 requires that a claim be in writing and shall be "submitted to the contracting officer for a decision." 41 U.S.C § 605(a). The regulations applicable to the contract at bar do provide a definition of the term:

> "Claim," as used in this subpart, means a written demand or written

> assertion by one of the contracting parties seeking, as of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . However, a written demand or written assertion by the contractor seeking the payment of money exceeding $50,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

FAR 33.201. The reference in this definition to FAR 33.206(a) is to the standard process for initiating any new claim. It is not unique to vouchers or invoices. This definition therefore does not contemplate that vouchers metamorphose into claims merely be the reagent of dispute. A separate document constituting a claim must be submitted for resolution.

The Federal Circuit has recently resolved the question of whether this language at FAR 33.201 should be construed to limit claims to matters in dispute. In Dawco Constr., Inc. v. United States, No. 90-5074, slip op. at 11 (Fed Cir. April 3, 1991), the court held that "[c]learly, the FAR mandates that, inter alia, a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." The court also relied on disputes clause language, also found at the same FAR provision, "that a 'request for payment that is not in dispute when submitted is not a claim for purposes of the Act.'" Id. From these phrases, the court concluded,

> The language is not ambiguous, and means what it says: A contractor and the government contracting agency must already be in dispute over the amount requested. Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the

> Act, satisfy the clear requirement that the request be in dispute.

Id. (emphasis in original).

The Federal Circuit cited as additional support its decision in Mayfair Constr. Co. v. United States, 841 F.2d 1576, 1577 (Fed. Cir.), cert. denied, 488 U.S. 980 (1988). From this citation, it is apparent that differences in the wording of contract disputes clauses would not be a basis for distinguishing results in earlier decisions, as plaintiff here urges. It is also thus unnecessary to address plaintiff's argument that the trend before the boards of contract appeals was to the contrary.[8] See also Hoffman

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[8]See e.g., A. & J. Constr. Co. IBCA No. 2269, 87-3 BCA ¶ 19,965; R.G. Beer Corp., ENG BCA No. 4885, 85-2 BCA ¶ 18162; Tera Advanced Servs. Corp., GSBCA No. 7109-NRC, 85-2 BCA ¶ 17,941; Lueltke Engineering Co., ENG BCA No. 4665, 82-2 BCA ¶ 15,851. But see Fortec Constr. Co., ASBCA No. 27601, 83-1 BCA ¶ 16,402. Plaintiff also contends that it would be an anomalous result if interest were disallowed under the present circumstances, when the

(continued...)

Constr. Co. v. United States, 7 Cl. Ct. 518, 523 (1985) ("in order to have a legitimate claim, a dispute must exist"); Esprit Corp. v. United States, 6 Cl. Ct. 546 (1984), aff'd 776 F.2d 1062 (Fed. Cir. 1985) ("Congress wanted interest to run against the Government only when the Government delayed in resolving disputes." (emphasis in original).

This court concludes from Dawco that the parties must have reached something approaching impasse on some of the elements of the contractor's demand before a claim can arise.[9] Each

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[8](...continued)
bulk of the billings were confirmed, since interest is earned under the CDA if the matter is in dispute and interest is earned under the Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85 (1982), 31 U.S.C. §§ 1801-1806 (1988), upon submission of an invoice.

[9]The final sentence of the first paragraph of FAR 33.201 provides that a submission can be converted into a claim (after resubmission) if it "is not acted upon in a reasonable time." It is not
(continued...)

case must turn, therefore, on the result of a factual inquiry into circumstances surrounding the events leading to the demand.

Pursuant to Dawco, the letters of April 13 and April 15, 1987 were not claims. Although there was nothing tentative about the assertion of rights, although the CDA was invoked and although there was no question that a change order had taken place, it was not clear at that time that there would be a dispute as to the amount of compensation. The Government immediately commenced financial examinations of the claims, but the only indication that a dispute developed at any time is that Essex ultimately got less than the amounts demanded in the April letters. There is no evidence in the record that the parties were "discontinuing negotiations," or that a point was reached at which the

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[9](...continued)
clear what would constitute an unreasonable time.

"amount claimed was definitely in dispute." Dawco, slip op. at 14, 15. The materials had not been delivered at the time of the April letters. Both letters were sent to accompany contract pricing proposal cover sheets. For aught that appears, the April letters were "unilateral cost proposals," id. at 11, as to which the record shows no government rejection.

The only indication of a possible future dispute surrounding the April 13 and 15 letters was plaintiff's reservation of claims for delay or interest. Clearly a reservation of a potential claim, unrelated to the subject of the pending negotiations, cannot constitute a present dispute. While the plaintiff may have been entitled under the regulation to force the Government to either make a decision or incur interest charges, see supra note 6, the claims at issue here do not arise in that context.

The events leading up to the April 1987 letters are too similar to those outlined in Dawco to permit a different result. Although the precise nature of the numerous pieces of correspondence which the court found insufficient in that case is not clear, it is clear that they were found deficient in that they constituted proposals and points of departure for negotiations. In like manner, the April 1987 letters in this case transmit "revision[s] to . . . estimated cost proposal[s]." They were in response to invitations in the change orders to "negotiate[]" an equitable fixed price. The letter which the court in Dawco held to signal the existence of a dispute, although not part of the record, was conceded by the Government to be a claim and indicated to the court a condition in which "negotiations had clearly been abandoned, and the amount claimed was definitely in dispute." Dawco, slip op. at 15.

The same conclusion applies a fortiori with respect to the inspection reports arising out of the over and above work claims. The two different types of reports are quoted above. The first type, used until March 27, 1987, makes no reference to the CDA. Neither type was a present demand for money due. Unlike the first two types of change orders, where the Navy had already ordered the modified work to proceed, the inspection reports are no more than requests for permission to proceed with repairs. A description of proposed repairs and a request for permission to proceed is not a demand for payment. It is inherently conditional.

One issue remains. Plaintiff filed separate claims for recovery of interest on the quantum amounts claimed and ultimately settled. In her final decisions on those claims, as amended, the ACO decided that interest was due on the settlement of the 100 percent replacement

parts change order in the amount of $4,630.87. That decision was issued on February 20, 1990. On the same date, the ACO awarded interest on the settlement of the support equipment kit change order in the amount of $22,989.32. Neither of these amounts has been paid. The question becomes, is Essex entitled to assert a CDA claim for interest on those amounts?

Interest on claims brought pursuant to the CDA is controlled by section 12 of the act. 41 U.S.C. § 611. That section creates as a necessary condition to the award of interest that an amount be "found due [on the contractor's claim]." Plainly the claim contemplated by the act is one for an adjustment to the contract price. Interest is thus an adjunct to an underlying claim with respect to the principal liability. By the terms of the statute no interest arises absent some other claim. This is the plain import of Nab-Lord Assoc. v. United

States, 230 Ct. Cl. 694, 700, 682 F.2d 940, 944 (182). See also Hoffman Constr. Co., 7 Cl. Ct. at 522.

The submissions of May 2, 1989, May 16, 1989 and May 25, 1989 which seek interest on amounts paid for, respectively, support equipment, over and above work, and replacement parts, thus do not support an entitlement to money unless there had already been claims under the CDA. The fact that these submissions were properly certified and purport to be claims is irrelevant. If there were no CDA claims, a separate claim for interest would be ineffective, and if there had been CDA claims, a separate claim for interest would normally be a non-sequitur. Only if there had been a proper CDA claim, which was settled or acknowledged by the Government, but was then unpaid with respect to interest, would there be potential for a separate interest claim. In that event, the

court sees no proper, separate, CDA claim. The present circumstances do not give rise to just such a phenomenon, however, since the court had found that there were no underlying CDA claims.

CONCLUSION

Defendant's motion for summary judgement is granted. Plaintiff's motion for summary judgement is denied. The motion for sanctions is denied as being without merit. Defendant's motion to consolidate the two board actions with

this case is denied. The Clerk is directed to enter judgment dismissing the complaint. No costs.

ERIC G. BRUGGINK
Judge

IN THE UNITED STATES CLAIMS COURT

No. 90-174C
(Filed: April 25, 1991)

* * * * * * * * * * * * * *

ESSEX ELECTRO ENGINEERS, INC.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER ON RECONSIDERATION

Plaintiff has moved for reconsideration of the order of dismissal entered April 5, 1991. The motion correctly notes that the Prompt Payment Act was miscited. The correct citation is 31 U.S.C. §§ 3901-07 (1988). The Clerk is directed to substitute the attached page in place of the original.

The substance of the motion is that the Federal Circuit's opinion in Dawco Constr., Inc. v. United States, No. 90-5074 (Fed. Cir. April 3, 1991), upon which great reliance was placed by this court, is incorrectly decided. The question of whether there must be a "dispute" prior to submission of a claim was squarely addressed in the circuit court opinion. The support cited for that holding directly undercuts plaintiff's arguments to the contrary in this action. Although the motion for reconsideration questions reliance on that opinion in general, and specifically, reliance on Dawco without further input from the plaintiff, those criticisms are not a basis for reconsideration. This court is bound by the decisions of the Federal Circuit. The fact that plaintiff believes the holding at issue to be ill-considered does not alter this court's role. The result would have been no different if this

court had had the benefit of plaintiff's exegesis prior to ruling. Those contentions are properly addressed during an appeal.

In its conclusion, plaintiff for the first time requests, in the alternative, that it be allowed to amend its complaint to proceed under the Prompt Payment Act. Such a contingency should have been apparent much earlier. It was not timely requested, and the court feels no obligation to seriously treat with a motion to amend after entry of judgement has been directed. RUSCC 15(a). In any event, the plain import of Dawco is that, despite the interest provisions of the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1988), and despite the Prompt Payment Act, Congress allowed for a possible middle ground between claims and invoices - a grey area into which fall pre-dispute demands for payment, such as those here. This court has

no mandate to revisit whether that result is the correct one.

The court has considered the other ground argued and finds that they do not provide a basis for reconsideration.

ERIC G. BRUGGINK
Judge

Jan. 28, 1983

Mr. James T. Brannan
Director
Defense Acquisition Regulatory Council
Office of the Under Secretary of Defense
Washington, DC 20301

Dear Mr. Brannan:

This letter is in reply to your request for comments on proposed revisions to DAR coverage of the Contract Disputes Act of 1978 (DAR Case 80-86).

We have reviewed the proposed revision and have the following comments. The proposed DAR coverage does not properly implement the Contract Disputes Act. The Act does not require that a claim be "disputed by the other party", nor does it require that a claim be submitted under the Disputes clause. In addition, the proposed DAR coverage conflicts with OFPP Policy Letter 80-3, "Regulatory Guidance on P.L. 95-563, the Contract Disputes Act of 1978", and

Part 33, "Disputes and Appeal", of the FAR planning document.

I suggest that the existing coverage of the Contract Disputes Act be retained, rather than incorporating the proposed revision.

Sincerely,

Donald E. Sowle
Administrator